

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

City of Burlington, Vermont

Docket No. QM13-4-000

(Issued November 22, 2013)

Attached is a statement by Chairman Wellinghoff dissenting to an order issued on November 13, 2013, in the above referenced proceeding. *City of Burlington, Vermont*, 145 FERC ¶ 61,121.

Kimberly D. Bose,  
Secretary.

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City of Burlington, Vermont

Docket No. QM13-4-000

WELLINGHOFF, Chairman, *dissenting*

(Issued November 22, 2013)

I dissent from the majority's decision to terminate Burlington's obligation to purchase the output of the 7.4 MW Chace Mill QF for several reasons. While the majority appropriately recognizes that the burden of proof rests with Burlington, the electric utility, the majority relies on several assertions made by Burlington, which in my estimation, do not rise to the level of evidence sufficient to meet this burden.

First, the majority gives credence to Burlington's argument that the state purchasing agent's resale of the QF's output demonstrates that Chace Mill has nondiscriminatory access to the ISO-NE markets. Under Vermont's implementation of PURPA, Winooski One sold energy from Chace Mill to Vermont retail electric utilities on a pro rata basis through VEPP Inc. (VEPPI), a state purchasing agent, as required by Vermont Public Service Board Rule 4.104. The retail electric utilities, in turn, re-sold energy and capacity from Chace Mill in the ISO-NE markets, with Vermont Electric Power Company (VELCO) acting as lead market participant. These subsequent sales through VELCO, with the original Chace Mill sales having been made pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA), do not in any way demonstrate the feasibility of market access by Winooski One without the PURPA mandatory purchase obligation. This is because the PURPA mandatory purchase obligation dictated that Burlington purchase electric energy from the QF; once the sale from the QF took place pursuant to that obligation, whether the capacity and/or energy was resold into the ISO-NE markets by VEPPI is irrelevant to a determination that Chace Mill does, or does not, have access to the ISO-NE markets.

Second, the order reflects that

Burlington states that it believes that energy from Chace Mill has been sold into the ISO-NE markets since April 1, 2013, demonstrating that Chace Mill has nondiscriminatory market access. Burlington concedes, however, that it is no

longer in a position to verify that capacity and energy continues to be sold from Chace Mill to the ISO-NE markets.<sup>1</sup>

Stating that “the nature and extent of those sales are not articulated with specificity” and that “no party disputes that there are sales,” the majority concludes “it appears that there are no existing barriers to Chace Mill’s ability to access the ISO-NE market.”<sup>2</sup> However, reliance on what the utility “believes” rather than what it can demonstrate is insufficient to rebut the presumption that Chace Mill, as a QF 20 MW or smaller, lacks access to the ISO-NE markets.

Third, the majority finds that “on the current record it appears that there is nothing that stands in the way of Chace Mill reaching [the ISO-NE] markets, including charges for interconnection or distribution service.”<sup>3</sup> The majority appears to rely on GDF Suez’s 50 percent ownership interest in Winooski One to find that market participation is not a foreign practice to Chace Mill and its ownership. However, the assertion that a half-owner might have relevant market experience does not outweigh the fact that Chace Mill’s access to a market is at best indirect and dependent on Burlington providing such access. Here, Winooski One’s QF is wholly dependent on Burlington’s 13.8 kV radial distribution system, which is Chace Mill’s only potential path to a market. This is precisely the type of situation that lead the Commission to establish the rebuttable presumption, contained in section 292.309(d)(1) of the Commission’s regulations, that a QF with a capacity at or below 20 MW does not have nondiscriminatory access to markets.<sup>4</sup>

Fourth, the majority acknowledges that, absent a purchase obligation pursuant to PURPA, there is no legal instrument requiring Burlington to provide nondiscriminatory wheeling service to Winooski One. Burlington has, for example, no reciprocity tariff on file with the Commission that would provide open and nondiscriminatory access to a market. Although Burlington states that it has no intention to cease providing Winooski

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<sup>1</sup> Order at P 8.

<sup>2</sup> *Id.* P 33.

<sup>3</sup> *Id.* P 34.

<sup>4</sup> *See New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at P 96 (2007) (smaller QFs, because of their location on lower voltage radial lines, “are more likely to have to overcome obstacles, such as jurisdictional differences, pancaked delivery rates, and perhaps additional administrative procedures, to obtain access to distant buyers”).

One with access to Burlington's distribution system in order for Chace Mill to reach the ISO-NE markets, Burlington is not bound to provide access in the future. The Commission would not need to find that all exempt utilities, such as municipal utilities, must have a reciprocity or open access transmission tariff on file in order to be relieved of their mandatory purchase obligations. A long-term contract arrangement acceptable to both parties might, for example, suffice. However, the Commission did not make such a finding here or even condition its grant of Burlington's petition on Burlington filing a tariff or agreement, as Burlington itself suggested that the Commission could do if necessary.<sup>5</sup> As the Commission found in Order Nos. 688 and 688-A, the absence of such legal instruments can, and in this proceeding does, result in substantial uncertainty regarding whether a QF such as Chace Mill is able to access markets such as the ISO-NE markets. Such uncertainty is sufficient to warrant a finding that the filing utility has failed to carry its burden.<sup>6</sup>

Fifth, according to expert evaluations presented by Burlington itself on the fair market value of Chace Mill, annual wheeling charges could total as much as \$286,000 per year, amounting to approximately 23 percent of Chace Mill's total annual revenue. While Burlington points out that two other studies it has commissioned predicted wheeling charges less than that amount,<sup>7</sup> such disparity among the estimates raises more, not less, uncertainty concerning what market access Chace Mill would have without the PURPA mandatory purchase obligation. Additionally, until such wheeling charges are finally established, they could be subject to lengthy and costly litigation in state and federal fora—a costly multi-jurisdictional fight that presents a particular challenge to 20 MW and below QFs. Given the absence of a reciprocity tariff or other legal instrument, the lack of certainty regarding the availability of open, nondiscriminatory interconnection and transmission, and the lack of certainty as to the level of any charges pose potentially significant obstacles to access to the ISO-NE markets by a QF like Chace Mill located at the end of a radial distribution line, I would not have found that this QF has nondiscriminatory access to the ISO-NE markets.<sup>8</sup>

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<sup>5</sup> Burlington Answer at 17.

<sup>6</sup> See *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 78 (2006); Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 94-103.

<sup>7</sup> Burlington Answer at 18-19 & n.37 (citing other estimates that Chace Mill would face wheeling charges of about \$131,400 per year or no charges at all).

<sup>8</sup> See Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103 (“[M]ore often than not, a small QF will have greater difficulty obtaining nondiscriminatory access to markets due to the tendency for small QFs to be interconnected to lower voltage radial  
(continued...)”)

Sixth, while acknowledging that the Commission has held that “a QF that has initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to the applicable electric utility filing its petition for relief pursuant to § 292.310 of the Commission’s regulations will be entitled to have any contract or obligation that may be established by state law grandfathered,”<sup>9</sup> and that Winooski One initiated a state proceeding before Burlington filed its petition, the Commission declined to assess that proceeding’s significance. Instead, I would have noted that the Commission’s regulations entitle a QF to choose to sell pursuant to a legally enforceable obligation<sup>10</sup> and that both section 210(m)(6) of PURPA and section 292.314 of the Commission’s regulations provide for the grandfathering of rights pending approval before a state regulatory authority.<sup>11</sup> Thus, I would have found that if the Vermont Public Service Board finds that Winooski One initiated a proceeding to establish a legally enforceable obligation before Burlington filed its application in the instant proceeding, Winooski One’s rights would be grandfathered by its actions initiating that state proceeding and section 210 (m) would have no impact on those rights. Finally, the Commission must be mindful of its statutory directives under the rest of PURPA, in addition to those directives in section 210(m). While section 210(m)(1) requires the Commission to terminate the requirement of an electric utility to enter into a new contract or obligation with the QF if it finds that the QF has nondiscriminatory access to a markets of a quality described in section 210(m)(1) of PURPA, the Energy Policy Act of 2005 did not repeal PURPA or the Commission’s obligation to encourage QF development. Ultimately, the Commission has a statutory obligation under PURPA to prescribe such rules as the Commission determines necessary to encourage cogeneration and small power production, including rules requiring electric utilities to

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lines, and the consequent need to overcome other potential obstacles to nondiscriminatory access, such as local distribution access rules that are not within the Commission’s jurisdiction, pancaked delivery rates and additional administrative burdens to obtain access to buyers other than the interconnected utility.”).

<sup>9</sup> Order at P 37 (citing Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137; 16 U.S.C. § 824a-3(m)(6) (2012); 18 C.F.R. § 292.314 (2013)).

<sup>10</sup> 18 C.F.R. § 292.304 (d) (2013); *see JD Wind 1, LLC*, 129 FERC ¶ 61,148, at PP 25-27 (2009), *order denying rehearing, reconsideration or clarification*, 130 FERC ¶ 61,127 (2010).

<sup>11</sup> 16 U.S.C. § 824a-3(m)(6) (2012); 18 C.F.R. § 292.314 (2013).

offer to purchase electric energy from and sell electric energy to QFs.<sup>12</sup> Granting this petition, with the scant level of evidence in the record, is not a sufficient execution of the requirements of PURPA and the Commission's regulations.

For these reasons, I respectfully dissent.

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Jon Wellinohoff, Chairman

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<sup>12</sup> 16 U.S.C. § 824a-3(a) (2012).